IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FARAD CONTINUATION SHEET

FIRST APPEAL NO.831 OF 2004 with

Thakur Mitra Mandal ...Appellant

Vs.

Bombay Municipal Corporation ...Respondent

FIRST APPEAL NO.832 OF 2004

Satrughnan Singh ...Appellant

Vs.

Bombay Municipal Corporation ...Respondent

Mr.A.A.Kumbhakoni with Ajay Mishra for the Appellants
Shri M.D.Patil for B.M.C.

CORAM: A.S.OKA, J.

DATED: AUGUST 25, 2004.

P.C.:

1. These two First Appeals can be conveniently disposed of by a common Judgment as the subject matter of both the Appeals is the same structure. First Appeals are admitted. Shri Patil appearing for the Respondent-Corporation waives service. Considering the facts and circumstances of the case, the First Appeals are taken up for hearing forthwith.

2. The Appellants are the original Plaintiffs. The

challenge is to the action under Section 314 of Bombay Municipal Corporation Act, 1888 (hereinafter referred to as the said Act of 1888) which is initiated on the basis of notices dated 22nd April 1995 and 28th May 1997. One of the contentions raised by the Appellants is that even when the Respondent-Corporation wants to invoke the power under Section 314 of the said Act of 1888, requirement to comply by principles of natural justice is not dispensed with. The reliance is placed on the Judgment of the learned Single Judge of this Court (Coram:Khanwilkar,J.) in Appeal from Order No.681 of 2001 and other connected Appeals in support of the said contention. In paragraph No.10 of the said Judgment the learned Single Judge has held that,

> "....In my view, it is obligatory on the authorities to give opportunity to the Appellants to produce materials in support of their case as to why proposed action under Section 314 of the Act is not warranted. The commissioner or his delegate may issue notice calling upon the Appellants to show cause; and after giving fair opportunity to them, it will be open to the authorities to take such decision as would be advised on the basis of the fact situation of each case that may be obtained from records before it. It is, however, made clear that if any adverse orders are passed against the Appellants they shall be informed in writing in that behalf and also given atleast one week's time from the date of service of such order before taking proposed action..."

. It is an admitted position that opportunity as contemplated by this Court in the aforesaid Judgment was not given to the Appellants.

3. One Haribansh Singh Kedarnath Singh has filed an Affidavit-cum-undertaking in First Appeal No.831 of 2004. Same is taken on record and marked "X" for identification. Paragraph Nos.2 and 3 of the said Affidavit-cum-undertaking read thus :

> . "I say that the Appellant abovenamed has passed resolution dated 23.8.2004. Hereto annexed and marked Exhibit "A" is a copy of the same. I say that by virtue of the said resolution I am authorised to file the present Affidavit-cum- Undertaking on behalf of Appellant as follows:
>
> . The Appellants shall not carry out any addition, extension, alteration or construction of any nature whatsoever in the suit premises till upon personal hearing by the Ld.assistant Municipal Commissioner, P/South Ward office takes a final decision and order passed in respect of the notice dated 22.4.95 issued by the Respondent u.314 of B.M.C. Act. The Appellant further undertake that they shall not create any third party right, title and interest in respect of the suit premises and/or part with possession thereof. The Appellant further undertakes that the Appellants shall not erect any pendol for religious function at the suit site till aforesaid decision."

4. Shri Satrughnan Singh, Appellant in First Appeal No.832 of 2004 has also filed a similar Affidavit-cum-undertaking. Same is taken on record and marked "X" for identification.

Paragraph No.3 of the Affidavit-cum-undertaking reads thus,

> . "I shall not carry out any addition, extension, alteration or construction of any nature whatsoever in the suit premises till upon personal haring by the Ld. Assistant Municipal Commissioner, P/South Ward office takes a final decision and order passed in respect of the notice dated 28.5.95 issued by the Respondent under Section 314 of B.M.C. Act. I further

> undertake that I shall not create any third party right, title and interest in respect of the suit premises and/or part with possession thereof. I further undertake that I shall not erect any pendol for religious function at the suit site till aforesaid decision."

5. A true copy of the resolution passed by the Appellant in First Appeal No.831 of 2004 is annexed to the Affidavit of Haribansh Singh Kedarnath Singh. In the said resolution it is stated that the said Haribansh is the Vice President of the Appellant and is authorised to sign and file undertaking on behalf of the Appellant. Both the undertakings are accepted.

6. The Trial Court has recorded a finding that the suit structure is on the set back land portion. However, the challenge to the action under Section 314 of Mumbai Municipal Corporation Act on the ground of failure to give opportunity to the Appellants of being heard is not considered by the Courts below. Considering the unconditional undertakings which are tendered by the Appellants on record, it will be in the interest of justice if the Respondent-Corporation is directed to give opportunity to the Appellants to file reply and to produce the documents. Shri Patil learned Counsel for the Respondent stated that the Assistant Commissioner P/South Ward of the Respondent-Corporation is the Officer empowered to give hearing to the Appellants. In view of this position, the First Appeals and consequently the suits filed by the Appellants are disposed of by passing following order :

i) The Appellants are at liberty to file reply to the notice dated 22nd April 1995 bearing No.WOP/S/076/SR/AEM or the notice dated 28th May 1997 bearing No.AFM/PS/97-98, as the case may be, by treating the same as a Show Cause Notice. The reply shall be filed by the Appellants along with documents in support, if any, with the Assistant Commissioner, P/South Ward of the Respondent-Corporation on or before 1st October 2004.

ii) The Assistant Commissioner shall consider the reply filed by the Appellants and pass appropriate order within a period of four weeks thereafter.

iii) If no reply is filed on or before 1st October 2004, the Respondent-Corporation will be free to take action against the suit structure. If reply is filed within the stipulated time, the action for demolition and removal shall not be taken till the order is passed by the Assistant Commissioner.

iv) If the order passed by the Assistant Commissioner, P/South Ward is adverse to the Appellants, the same shall be communicated to the Appellants. The said adverse order shall not be given effect to for a period of one week from the date of communication of the order to the Appellants.

v) There will be no order as to costs.

vi) All contentions on merit are kept open.

vii) Parties to act upon an ordinary copy of the order duly authenticated by the Court Sheristedar.

Judge.